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CHARLES ELMORE CROPLEY

# Supreme Court of the United States

OCTOBER TERM, 1944.

IN THE MATTER OF

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, Debtor.

THE COMMONWEALTH OF MASSACHUSETTS,
THE CITY OF BOSTON,
WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,
THE MUTUAL SAVINGS BANK GROUP COMMITTEE FOR BOSTON TERMINAL COMPANY BONDS,

*Petitioners,*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor, *et al.*,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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OCTOBER TERM, 1944.

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NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, DEBTOR.

THE COMMONWEALTH OF MASSACHUSETTS,
THE CITY OF BOSTON,
WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, TRUSTEE,
THE MUTUAL SAVINGS BANK GROUP COMMITTEE FOR BOSTON TERMINAL COMPANY BONDS,
*Petitioners,*

*v.*

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, ET ALS.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

*To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:*

Your petitioners, the Commonwealth of Massachusetts, the City of Boston, Webster and Atlas National Bank of

Boston, Trustee (said Bank being the duly appointed successor of Old Colony Trust Company, of Boston, as Trustee under the Indenture dated July 29, 1896, under which the now outstanding first mortgage bonds of The Boston Terminal Company were issued), and The Mutual Savings Bank Group Committee for Boston Terminal Company Bonds respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered on January 30, 1945, in the form of an order for mandate pursuant to an opinion rendered January 2, 1945, as modified by an opinion rendered January 23, 1945, reversing in part and affirming in part an order of the District Court of the United States for the District of Connecticut approving a plan of reorganization of the New York, New Haven and Hartford Railroad Company, debtor, and secondary debtors, under section 77 of the Bankruptcy Act (11 U.S.C. sec. 205).

## Opinions Below.

The opinions of the District Court are reported in 54 F. Supp. 595, and 54 F. Supp. 631. The opinions of the Circuit Court of Appeals are reported in 147 F. (2d) 40.

## Jurisdiction.

The Circuit Court of Appeals entered its order for mandate on January 30, 1945, pursuant to an opinion rendered January 2, 1945, as modified by an opinion rendered January 23, 1945 (R. p. 11525). Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C. sec. 347 (a)), and section 24 (c) of the Bankruptcy Act (11 U.S.C. sec. 47(c)).

**Statute Involved.**

The statute involved is section 77 of the Bankruptcy Act (11 U.S.C. sec. 205).

**Statement of the Matter Involved.**

The Old Colony Railroad Company (hereinafter called the Old Colony) was incorporated by the Commonwealth of Massachusetts by chapter 143 of the Acts of 1872 as a consolidation of previously existing Massachusetts railroad corporations. The Boston & Providence Railroad Corporation (hereinafter called the Providence) was incorporated by the Commonwealth of Massachusetts by chapter 56 of the Acts of 1831. The New England Railroad Company (hereinafter called the New England) was incorporated by the Commonwealth of Massachusetts by chapter 484 of the Acts of 1895 to exercise the franchise granted to a preceding Massachusetts corporation. The Boston & Albany Railroad Company (hereinafter called the Albany) was incorporated by the Commonwealth of Massachusetts by chapter 270 of the Acts of 1867, which consolidated existing Massachusetts corporations. The New York, New Haven & Hartford Railroad Company (hereinafter called the New Haven) was incorporated by the Commonwealth of Massachusetts by chapter 171 of the Acts of 1872, which merged previously existing Massachusetts railroad corporations with a corporation existing under the laws of the State of Connecticut.

By instrument dated April 7, 1888, the Providence was leased to the Old Colony for a term of ninety-nine years from April 1, 1888[1] (see Mass. St. 1888, c. 42). By instrument dated February 15, 1893, the Old Colony Rail-

[1] 239 I.C.C. 337, 342; R. pp. 7875, 184.

road, including the leasehold interest in the Providence, was leased to the New Haven for a term of ninety-nine years from March 1, 1893.[2]

In 1896 the Old Colony, the Providence, the New England, and the Albany all entered Boston from the south, and terminated there. Each had a separate terminal station located at a considerable distance from those of the others, and not only did the approaching tracks cross busy city streets at grade, but also the tracks of one railroad crossed those of another at grade. These conditions[3] caused danger as well as inconvenience, not only to the public traveling on these railroads but to the public generally. To remove this evil the Commonwealth of Massachusetts passed a statute (St. 1896, c. 516, R. p. 167) which created a corporation under the name of The Boston Terminal Company to construct and maintain a union passenger station and to provide and operate adequate terminal facilities "for the accommodation of the public in connection therewith" (§ 1).

The basic purpose of the statute was to provide for the accommodation of the public (§§ 1, 6, 7, 11) with special reference to safety as well as to convenience, as the statute itself explicitly declared (§§ 6, 7). To this end final authority to determine on the plans for the union terminal in accordance with the dictates of public safety and convenience was given to the state Board of Railroad Commissioners (§§ 6, 7). The City of Boston was required on the one hand to make heavy expenditures of public money[4] in order to carry out specifically designated changes in highways and bridges (§§ 11, 13), and on the other hand

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[2] 239 I.C.C. 337, 342; R. p. 7875.

[3] They are set forth in detail in the Massachusetts Statute of 1896, referred to *infra;* R. p. 167, Appendix, p. 50.

[4] See also St. 1898, c. 248 (Mass.); St. 1899, c. 466 (Mass.).

to assess betterments flowing specially from the location and construction of the terminal (§ 14). Upon the Terminal Company was conferred not only whatever power of eminent domain was needed (§§ 5, 23) but the additional power to require another railroad and a street railway to relocate their existing tracks in public highways (§§ 15, 16).

The statute was mandatory and obligatory, not merely enabling or permissive, both as to the immediate erection of the terminal by the Terminal Company (§§ 6, 7) and as to the use of the terminal thereafter by the railroads specifically named in the statute "for all of their terminal passenger business in Boston, instead of the passenger terminals now used by them" (§ 9). And to this end, and also with respect to all the obligations imposed by the statute, special jurisdiction was conferred upon the highest court of the Commonwealth to enforce the legislative mandate (§§ 6, 9, 10, 11, 15, 16, 19, 22).

The obligations created by the statute were not based upon privity of contract between the Terminal Company and the named railroads. On the one hand, the statute required the Terminal Company as owner[5] of the union terminal to provide terminal facilities for the named railroads (§§ 1, 9, 10, 11). On the other hand, the statute imposed upon the named railroads the obligation to use the terminal for all of their terminal passenger business in Boston (§ 9). Moreover, the statute not only directly imposed upon the named railroads the obligation to pay to the Terminal Company for the required use the amount deemed necessary by the Commonwealth for the maintenance and operation of the terminal, but itself directly fixed and prescribed the terms of payment as between the named

[5] See *Frazier* v. *New York, New Haven & Hartford Railroad*, 180 Mass. 427 (1902); *Hunt* v. *New York, New Haven & Hartford Railroad*, 212 Mass. 102 (1912).

railroads and the Terminal Company (§ 10). The payment so prescribed was "such amounts as may be necessary to pay the expenses of its corporate administration and of the maintenance and operation of said station, and of the facilities connected therewith and owned by said Terminal Company, including insurance and all repairs, all taxes[6] and assessments which may be required to be paid by said Terminal Company, the interest upon its bonds or other obligations issued under the provisions of this act as the same shall become payable, and a dividend, not to exceed four per cent. per annum, upon its capital stock." The statute further provided that each of the named railroads should pay for such use of the terminal and facilities "in the proportion in which it has the use thereof," and conferred upon the State Board of Railroad Commissioners special jurisdiction to make the apportionment amongst the named railroads if they failed to agree amongst themselves. And "the payments required to be made by them respectively to said terminal company either by such agreement or decisions shall be deemed a part of their operating expenses" (§ 10).

The railroads named in the statute were the Albany, the New England, the Providence, and the Old Colony, and in addition the New Haven, "being lessee of the Old Colony Railroad Company" (§ 2).

In 1898 the New England was leased to the New Haven,[7] and in 1908, under authority of chapter 252 of the Acts of 1905, the New England was merged with the New Haven. By St. 1921, c. 363, the Terminal Company statute

[6] Section 25 of the statute provides that the Terminal Company's real estate required by the act to be used by the railroad companies shall be assessed to and the taxes thereon paid by the railroad companies referred to in said section instead of the Terminal Company (R. p. 184).

[7] See Mass. St. 1898, c. 399.

was made applicable to the New York Central Railroad Company as lessee of the Albany.

In 1931, on petition of the New Haven, the Department of Public Utilities of the Commonwealth of Massachusetts (successors to the Board of Railroad Commissioners)[8] determined that the proportion of use of the terminal facilities be fixed at 70% by the New Haven and 30% by the New York Central as lessee of the Albany.[9] This determination has never been revised.

In October, 1935, proceedings for the reorganization of the New Haven under Section 77 of the Bankruptcy Act were begun in the District Court for the District of Connecticut.[10] In June, 1936, the Old Colony lease to the New Haven was rejected,[11] whereupon proceedings were begun in the same court for the reorganization of the Old Colony as a secondary debtor, and the court directed the New Haven trustees to operate the Old Colony for the account of the Old Colony estate.[12] In July, 1938, the Providence lease to the Old Colony was in turn rejected, and the court ordered the New Haven trustees to operate the Providence.[13] Proceedings for the reorganization of the Providence were begun in the District Court for the District of Massachusetts in August, 1938,[14] and are still pending.

The New Haven trustees continued to make the same statutory payments to the Boston Terminal Company which the New Haven, pursuant to the 1931 apportionment, was making at the commencement of the reorgan-

[8] The Board of Railroad Commissioners became the Public Service Commission by St. 1913, c. 784 (Mass.), and later became the Department of Public Utilities by St. 1919, c. 350 (Mass.).

[9] R. p. 199.

[10] 239 I.C.C. 337, 338; R. pp. 7870, 7871.

[11] 239 I.C.C. 337, 342; R. p. 7875.

[12] 239 I.C.C. 337, 379; R. p. 7920.

[13] 239 I.C.C. 337; R. p. 7874.

[14] 239 I.C.C. 337, 342; R. pp. 7875, 7876.

ization proceedings until October 30, 1939, when the District Court for Connecticut at the request of the New Haven trustees ordered them to suspend so much of the payment as represented 70% of the bond interest and franchise taxes of the Terminal Company.[15]

This withholding of part of the amount necessary for the payment by the Terminal Company of its franchise taxes and bond interest rendered it unable to meet its current obligations in full, and on November 3, 1939, proceedings for its reorganization were instituted in the District Court for the District of Massachusetts,[16] and are still pending.

On March 22, 1940, the Interstate Commerce Commission rendered a report and order approving a plan of reorganization for the New Haven without the inclusion of the Old Colony.[17] It authorized but did not require the acquisition of the Providence. It made no provision for

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[15] The order was reversed by the Circuit Court of Appeals. *Webster & Atlas Nat. Bank of Boston* v. *Palmer*, 111 F. (2d) 215 (1940). This Court granted certiorari, 311 U.S. 624 (1940), and reversed the decision of the Circuit Court of Appeals on the ground that the order dealt merely with an administrative matter within the discretion of the District Court, leaving open the question of ultimate liability to the Terminal Company under the Terminal Company statute. *Palmer* v. *Webster & Atlas Nat. Bank of Boston*, 312 U.S. 156, 168 (1941).

It should be noted that at the time of entry of this order the New Haven trustees, pursuant to an earlier order of the District Court, had ceased to operate trains for their own account into the terminal over the New England Division of the New Haven (formerly the New England Railroad), as pointed out on page 159 of the decision of this Court. However, that use of the terminal by the New Haven trustees was later resumed as a result of the decision by this Court in *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939), and still continues.

[16] *Boston Terminal Co.* v. *Mutual Savings Bank Group Committee*, 127 F. (2d) 707 (C.C.A. 1st, 1942).

[17] 239 I.C.C. 337; R. p. 7863.

curtailment of the obligation of any of the railroads concerned in the reorganization to render passenger service or for interference with any of the obligations imposed by the Terminal Company act. This plan of reorganization was modified by a Supplemental Report and Order dated February 18, 1941,[18] which required acquisition of the Old Colony by the New Haven and also required acquisition of the Providence if a plan of reorganization simultaneously approved by the Commission for the Providence should be approved and confirmed by the court.[19] The modified plan proposed by the Supplemental Report and Order contained a provision for curtailment by the reorganized principal debtor of passenger service on the Old Colony in certain contingencies, but contained no provision purporting to modify any of the obligations imposed by the Terminal Company statute. This plan was certified to the District Court and was followed shortly after by a Second Supplemental Report and Order dated March 25, 1941,[20] which purported to clarify a provision in the First Supplemental Report and Order not here material.

Objection to the inclusion of the Old Colony was made by certain New Haven creditors. While these and other objections were under consideration by the court, the court on its own motion, on June 3, 1941, informally appointed a committee (afterwards known as the Compromise Committee) to explore the possibility of discovering a basis upon which the acquisition of the Old Colony might be acceptable to New Haven creditors.[21] This committee consisted of four members, all of whom were expressly appointed to act in their individual and not representative capacities for the sole purpose of making recommenda-

[18] 244 I.C.C. 239; R. p. 8037.
[19] 244 I.C.C. 239, 247; R. pp. 8049, 8109, 8110.
[20] 244 I.C.C. 521; R. p. 8115.
[21] 254 I.C.C. 63, 64; R. pp. 8956-8958, 9013, 9760.

tions which were to have no binding force whatever. The committee made to the court an *ex parte* report, dated September 19, 1941, which was never publicly disclosed until attached as an appendix to the unreported opinion of the court dated December 8, 1941, disapproving the proposed plan of reorganization.[22] This report proposed the acquisition of the Old Colony by the New Haven through the instrumentality of a plan which of itself would, first, amend the charters of the New Haven and of the Old Colony so as to permit the reorganized principal debtor and the Old Colony to curtail passenger service on Old Colony lines, and, second, further amend these charters so as to reduce and limit the amount which the railroads in reorganization would be required to pay for the use required by the Boston Terminal Company statute. (It is particularly noteworthy that the report of the Compromise Committee did not propose to interfere in any way with the *obligation to use and the obligation to permit use* imposed by the Terminal Company act upon railroads and the Terminal Company, respectively.)

With respect to these proposals, the District Court, in its opinion of December 8, 1941, said:

> ". . . the report of the Compromise Committee suggests appropriate modifications of the charters of the debtor railroads whereby a ceiling is imposed upon the amounts they shall be obligated to pay to the Terminal Company. The proposal seems to recognize that the Terminal Company Act is not only a charter of the Terminal Company but also a modification of the charters of the debtor railroads. Thus authority for the charter modifications now proposed by the Committee is brought within subdivision (b) of Sec-

[22] 254 I.C.C. 63, 64, R. p. 9760. See also R. pp. 8958, 9013.

tion 77 which provides that a plan may include 'the amendment of the charter of the debtor'." [23]

Hence it is apparent that the concept of the legality of circumventing obligations imposed by Massachusetts laws in the exercise of the police power by means of a plan provision amending *ex proprio vigore* the charters of the bankrupt railroads did not originate with the Commission but was recommended to the Commission by the District Court.

The District Court, having disapproved the plan proposed by the First and Second Supplemental Reports, referred the proceedings back to the Commission,[24] which thereupon ordered the proceedings to be reopened and assigned them for public hearing on February 17, 1942.[25] This hearing was closed on February 20, 1942, at which time the Director of the Bureau of Finance of the Commission, who was presiding, ordered the record to be kept open until April 4, 1942, for the purpose of receiving further proposals from the Compromise Committee with respect to the price to be paid for the acquisition of the Old Colony by the New Haven.[26] Thereafter, on April 4, 1942, there was filed with the Commission a document entitled "Joint Report," dated April 3, 1942, signed not only by the four members of the Compromise Committee, still acting solely in their individual capacities, but also by representatives of various New Haven and Old Colony creditors. It purported to be an amplification of the Report of the Compromise Committee by the addition of a definite proposal of the price which its authors were willing to

[23] R. pp. 8959, 8960.
[24] 254 I.C.C. 63, 64; R. p. 9760.
[25] R. p. 9.
[26] R. pp. 9761, 10720, 207, 209.

recommend for the acquisition of the Old Colony by the New Haven. It expressly stated that—

> "The proposals contained in the original Report of the Compromise Committee are, with but little modification, reaffirmed in all respects by this Joint Report, and, for convenience, are incorporated in this Report even where they are not modified by it." [27]

Although the provisions of this Joint Report with respect to curtailment of passenger service on the Old Colony did not differ in any substantial degree from the proposals of the Report of the Compromise Committee, the proposed treatment of the obligations imposed by the Terminal Company statute was vitally and fundamentally different from what had been proposed in the Report of the Compromise Committee. Whereas the latter had been limited to a proposed modification of the obligation created by the Terminal Company statute to *pay* for the use of the Terminal Company facilities, without any attempt to interfere with the *use obligation* itself, the Joint Report, on the other hand, in addition to the actual provisions of the Report of the Compromise Committee, proposed also to abrogate the *obligation to use* the passenger terminal.

It is most significant to note that until the Joint Report was filed on April 4, 1942, after the close of the hearing, there had never been any suggestion from any source that the obligation prescribed by the Massachusetts Act to use the terminal could or should be nullified by a plan of reorganization through the device of the amendment of the charters of the debtor railroads or in any other manner.

On October 6, 1942, without any hearing on the proposals of the Joint Report, the Commission rendered its Third

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[27] R. pp. 209, 210.

Supplemental Report and Order [28] approving a new plan of reorganization for the debtors, which adopted *in totidem verbis* the proposals of the Joint Report providing for the amendment by the plan itself of the charters of the Old Colony and of the New Haven so as (*a*) to authorize total discontinuance of passenger service on the Old Colony lines in certain contingencies, and (*b*) to abrogate entirely the statutory obligation imposed upon the debtor railroads with respect both to the use of the union passenger terminal and to the amount to be paid for the use. This was the first time the Commission proposed by means of a plan of reorganization to relieve any of the debtor railroads from the obligation imposed upon them by the Terminal Company statute to use the union passenger terminal for all their terminal passenger business in Boston.

Various petitions for modification of the plan approved in the Third Supplemental Report and Order were filed by parties in interest, including all the present petitioners. Thereafter, without further hearing, on July 13, 1943, the Commission rendered its Fourth Supplemental Report and Order,[29] approving a plan of reorganization containing modifications not material to any issue raised by this petition.

In the Fourth Supplemental Report the Commission showed itself to be under the serious misapprehension that the provisions of the Third Supplemental Plan relative to the Terminal Company statute, which were adhered to without change in the Fourth Supplemental Plan, were based upon the proposals contained in the Report of the Compromise Committee, the legality of which had been endorsed by the District Court in its opinion of December 8, 1941, whereas, as pointed out above, the provisions of the

[28] 254 I.C.C. 63; R. p. 9753.
[29] 254 I.C.C. 405; R. p. 10123.

Joint Report differed fundamentally from those of the Report of the Compromise Committee in this respect.[30]

The Fourth Supplemental Report and Order, together with a transcript of the proceedings, was forthwith certified to the District Court.[31] Within the time fixed by the court, these petitioners and various other parties in interest filed with the court objections and claims for equitable treatment, upon which notice of a hearing was then given by the court. After hearing, the court filed on December 21, 1943,[32] an opinion in which it found and ruled that substantial provisions of the plan were illegal,[33] and in terms sustained some of the objections to the plan.[34] Nevertheless, instead of disapproving the plan, the court in its said opinion expressed the intention of entering a decree which would "correct" the plan to the extent necessary to avoid "the impact" of the many provisions found to be illegal. Under the caption "General Observations and Conclusion" the opinion stated as follows:[35]

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[30] 254 I.C.C. 405, 425. The exact language of the Fourth Supplemental Report is as follows: ". . . ; that the court discussed the terminal-company problem at length in its opinion of December 8, 1941, on the plan, and commended the report made to it by the compromise committee which proposed adjusting the obligations of the debtors to the terminal company in the same way as provided for in our report of October 6, 1942, *supra*." R. p. 10160.

[31] A report and order approving a plan of reorganization for the Providence providing that with respect to the obligations both as to use and as to payment imposed upon the Providence by the Terminal Company statute the charter of the Providence is amended in the same manner as is provided in the case of the Old Colony was certified to the United States District Court for the District of Massachusetts, which court has not yet acted upon it (254 I.C.C. 126). R. p. 10217.

[32] *In re New York, N.H. & H. R. Co.*, 54 F. Supp. 595 (1943); R. p. 10695.

[33] R. pp. 10713, 10717, 10718, 10724, 10740, 10741; 147 F. (2d) 40, 44; R. p. 11527.

[34] R. pp. 10713, 10717, 10718, 10724, 10740, 10741.

[35] *In re New York, N.H. & H. R. Co.*, 54 F. Supp. 595, 630 (1943); R. p. 10762.

"After studious review of the entire subject-matter, I can at last say that I am satisfied that the plan in its entirety—with the corrections which are indicated in this opinion,—should be approved.

"The corrections, which I have indicated to eliminate what I conceive to be the unobserved impact of illegal standards and to reflect material changes occurring since the plan came forward, since all based upon findings of the Commission and consistent with its limitations, are all, I believe, within the power of the judge to make. Likewise, as to the constructions which I have put upon the plan.

"But having in mind the thought that the task of the court is brigaded with that of the Commission, let me express the hope that our combined efforts may not suffer from the lack of suitable liaison at this critical stage in the proceedings. And to provide appropriate opportunity for such liaison I will say that if the Commission after reading my opinion shall wish, of its own motion, to file any supplemental report or order, whether adapted to confirm my proposed action or to require action in another direction, I shall be glad to shape my decree accordingly."

The trustee in bankruptcy of The Boston Terminal Company, the Webster & Atlas National Bank of Boston, Trustee under The Boston Terminal Company mortgage, the Mutual Savings Bank Group Committee representing holders of Terminal Company bonds, the Institutional Group Committee for Boston Terminal Company bonds, and the Pennsylvania Railroad Company filed objections with the Interstate Commerce Commission challenging the power of the Commission to file a supplemental report modifying the Fourth Plan in the manner proposed by the court or to deal in any other manner with the plan which the Com-

mission had certified to the court, unless and until the plan had been disapproved by the court and the proceedings referred back to the Commission in accordance with the procedure required by section 77 (e) of the Bankruptcy Act.[36] Notwithstanding these objections, and in the absence of any decree by the court on the Fourth Plan, the Commission, on February 8, 1944, *without any hearing*, rendered its Fifth Supplemental Report and Order,[37] which by its express terms revoked and superseded its orders of February 18, 1941, March 25, 1941, October 6, 1942, and July 13, 1943,[38] and approved a new plan of reorganization for the debtors which adopted some of the changes which the court had proposed to make by judicial decree in the Fourth Plan, expressly rejected others, made some changes which the court had not proposed to make, refused to accept the distribution of securities proposed by the court, and instead prescribed a new distribution of securities which necessitated a substantial increase in the over-all capitalization of the reorganized New Haven as fixed in the Fourth Supplemental Report and Order.[39]

With respect to the Terminal Company statute, the Fifth Supplemental Report and Order, while retaining entirely unchanged the provisions of the Fourth Supplemental Report and Order, added two new paragraphs. One of these imposed upon the trustee in bankruptcy of The Boston Terminal Company the obligation to elect (a power which the Terminal Company itself could not exercise in view of the mandatory character of the Terminal Company statute) whether he will exclude the using bankrupt railroads from further occupation and use of the property of the Terminal Company and file a proof of claim for damages

[36] 257 I.C.C. 9, 10; R. pp. 10834, 10962.
[37] 257 I.C.C. 9; R. p. 10833.
[38] 257 I.C.C. 9, 58; R. p. 10923.
[39] 257 I.C.C. 9, 15, 21; R. pp. 10842, 10843, 10845, 10851, 10852.

in the New Haven proceedings, or will accept the terms proposed in the plan for the proposed modification of the obligations imposed by the Terminal Company statute, upon the condition that either acceptance of the proposed terms or failure to reject the plan within a time to be fixed by the Commission shall operate as a waiver of all claim of damage against the estates of the debtors.[40] The other paragraph purported to give the District Court the power to reshape the plan of reorganization in the event that the features of it relating to the Boston Terminal Company statute should be held to be illegal or "inappropriate for judicial approval."[41]

The Commission, without affording any opportunity for hearing[42] or petition for modification, immediately certified to the court the plan embodied in the Fifth Supplemental Report and Order. Certain of these petitioners then filed with the court motions to strike from the files this so-called Fifth Supplemental Report and Order. At a hearing these motions were denied, subject to exception.[43] The court gave notice to the parties in interest to bring in their objections to the Fifth Supplemental Plan, even though the court also ordered that the objections previously filed to the plan approved by the Fourth Supplemental Report and Order should apply to the plan purportedly approved by the Fifth Supplemental Report and Order.[44] Objections were filed by these petitioners and others. After hearing, the court on March 6, 1944, entered a decree[45] which denied the motions to strike and overruled all objections, both those expressly filed

[40] 257 I.C.C. 9, 25; R. pp. 10859, 10909; Appendix, p. 37.
[41] 257 I.C.C. 9, 25; R. pp. 10860, 10910; Appendix, p. 38.
[42] 147 F. (2d) 40, 44; R. p. 11528. See also R. p. 10835.
[43] R. p. 11053.
[44] 147 F. (2d) 40, 44; R. p. 11528.
[45] R. p. 11050.

against the plan approved by the Fifth Supplemental Report and Order and those which had been filed against the plan approved by the Fourth Supplemental Report and Order, and approved the plan embodied in the Fifth Supplemental Report and Order for the reasons set forth in an opinion of the same date,[46] which also incorporated the reasons contained in the earlier opinion of December 21, 1943, dealing with the Fourth Supplemental Report and Order. No decree on the Fourth Plan was ever entered.[47]

From the decree of March 6, 1944, these petitioners and others appealed to the United States Circuit Court of Appeals for the Second Circuit, which affirmed the decree so far as it related to these petitioners.[48]

The provisions of the Fifth Plan are set forth in full at pages 10833 to 10928 of the record. Certain parts of the Fifth Plan particularly pertinent to this petition are set forth in the Appendix.

The Massachusetts statutory provisions relating to curtailment of passenger service (as distinguished from the abandonment of lines) are set forth in the Appendix, together with a pertinent extract from the Interstate Commerce Act.

**Questions Presented.**

1. Were the provisions of the plan contained in the Fifth Supplemental Report and Order, in so far as they affect the petitioners, (*a*) illegal as being an unlawful invasion of the police power of the Commonwealth of Massa-

[46] 54 F. Supp. 631; R. p. 11024.

[47] 147 F. (2d) 40, 44; R. p. 11528.

[48] 154 F. (2d) 40; R. pp. 11525, 11563. The reversal of the decree in part directed the District Court to remand to the Commission a portion of the plan relating to the Old Colony and an order of remand has been made by the District Court to the Commission, which, without hearing, rendered its Sixth Supplemental Report and Order dated May 14, 1945.

chusetts as exercised under chapter 516 of the Massachusetts Acts of 1896, and (*b*) illegal as being an unlawful invasion of the jurisdiction of the Commonwealth of Massachusetts over passenger service to be rendered on railroad lines operated within the Commonwealth?

2. Do the provisions of section 77 of the Bankruptcy Act confer upon the Interstate Commerce Commission and the District Court power by a plan of reorganization *ex proprio vigore* so to amend the charters of the debtor railroads (*a*) as to relieve them from the obligations imposed by the Massachusetts Act of 1896, among said obligations being the requirement that the railroads named in said Act of 1896 use the Boston Terminal for all of their terminal passenger business in Boston, (*b*) as to relieve them of the duty of furnishing passenger service upon their lines while operated within the Commonwealth of Massachusetts as required by the statutes of said Commonwealth?

3. Do the provisions of section 77 of the Bankruptcy Act confer upon the Interstate Commerce Commission and the District Court power to exercise through a plan of reorganization the legislative function of amending a corporate charter granted by the legislature of a sovereign state?

4. Does section 77 confer upon the Interstate Commerce Commission and the District Court power to alter by means of a plan of reorganization relationships between a sovereign state and a debtor incorporated by the state other than a relationship of creditor and debtor?

5. Did the courts below correctly interpret and apply section 77 (b) of the Bankruptcy Act (*a*) in the matter of the amendment of charters of debtors in reorganization proceedings and (*b*) in the matter of making provision for nullification of valid state laws with which a proposed plan would conflict?

6. Do the provisions of section 77 (f) of the Bankruptcy Act add affirmatively to the powers conferred upon the Commission and the District Court by section 77 (b)?

7. Did the courts below correctly interpret and apply that part of section 77 (f) of the Bankruptcy Act which provides that the reorganized debtor shall have full power to carry out the plan, "the laws of any State or the decision or order of any State authority to the contrary notwithstanding"?

8. In formulating and approving a plan of reorganization under section 77 of the Bankruptcy Act may the Interstate Commerce Commission exercise the powers conferred upon it by the Interstate Commerce Act except those expressly authorized by section 77 (q)?

9. Do the provisions of section 77 of the Bankruptcy Act confer upon the Commission and the District Court power to make, upon the terms and conditions stated in paragraphs N(1)(a), N(1)(b) and N(3)(a) of the plan contained in the Fifth Supplemental Report and Order, the modifications stated therein of the obligations of the debtor railroads created and imposed by the Massachusetts Act of 1896 and by the statutes incorporating the debtor railroads and the provisions of the General Laws of Massachusetts relating to the obligations of the debtors to render service on their lines operated within the Commonwealth?

10. Do the provisions of section 77 of the Bankruptcy Act confer upon the Interstate Commerce Commission and the District Court power in and by a plan of reorganization of the debtor railroads in proceedings pending in the District Court of Connecticut to compel the trustee in bankruptcy of The Boston Terminal Company appointed by the District Court of Massachusetts in proceedings pending in that court to elect whether to accept or reject a so-called offer in said plan, said offer being upon terms en-

tirely different from those prescribed and made mandatory upon The Boston Terminal Company by the Massachusetts Act of 1896, which constitutes its charter?

11. Do the provisions of section 77 of the Bankruptcy Act confer upon the Commission and the District Court power by a plan of reorganization *ex proprio vigore* so to amend the charter and to amend or supersede the franchises and statutory obligations of the Old Colony Railroad Company as to relieve it from the obligations imposed by its charter and by the General Laws of Massachusetts to furnish passenger service upon its lines while operated in Massachusetts?

12. Did the Circuit Court of Appeals err in deciding that the District Court had not held and acted in violation of section 77 of the Bankruptcy Act (*a*) in failing to enter an order dismissing the proceedings or referring the proceedings back to the Interstate Commerce Commission for further action as required by section 77 (e) of the Bankruptcy Act after finding that the plan approved by the Fourth Supplemental Report and Order was in essential particulars illegal and inequitable; (*b*) in holding that the District Court had the power to make modifications in essential provisions of the plan and to approve the plan as so modified; and (*c*) in accepting the certification of a Fifth Supplemental Report and Order which without hearings revoked the Fourth Supplemental Report and Order and approved a new plan?

13. Did the Circuit Court of Appeals err in deciding that the Interstate Commerce Commission had not violated the provisions of section 77 of the Bankruptcy Act nor denied to these petitioners due process of law under the Fifth Amendment to the Constitution of the United States in certifying the Fifth Supplemental Report and Order revoking and superseding all former orders and approving a new plan of reorganization while the plan

approved by the Fourth Supplemental Report and Order and certified to the District Court was pending before the District Court?

14. Did the Circuit Court of Appeals err in deciding that the District Court had not violated the provisions of section 77 of the Bankruptcy Act nor denied to these petitioners due process of law under the Fifth Amendment to the Constitution of the United States in approving the plan approved by the Fifth Supplemental Report and Order certified by the Interstate Commerce Commission?

15. Did the Circuit Court of Appeals err in deciding that the Interstate Commerce Commission had not violated section 77 of the Bankruptcy Act nor denied to the petitioners due process of law under the Fifth Amendment to the Constitution of the United States in receiving and adopting *in totidem verbis*, after hearings had closed and without giving to the petitioners an opportunity to be heard thereon, the provisions of the so-called Joint Report, which for the first time proposed that the debtor railroads be relieved from the statutory obligation to use the Boston Terminal?

**Reasons for Granting the Writ.**

*In holding that a plan of reorganization under section 77 of the Bankruptcy Act may lawfully provide for the abrogation of a statute of a sovereign state enacted in the exercise of its police power, the Circuit Court of Appeals (a) decided important questions of law which have not been but should be settled by this Court, and (b) has decided these questions in a way probably in conflict with applicable decisions of this Court.*

The District Court, in sustaining the power of the Commission and the District Court through the provisions of

a plan of reorganization to modify the obligations of the debtor railroads under the Massachusetts Act of 1896 to use the Boston Terminal "for all of their terminal passenger business in Boston," rested its decision in part upon the power of the Commission under the Interstate Commerce Act and in part upon its power under the Bankruptcy Act and its decision was affirmed by the Circuit Court of Appeals.

A. The Interstate Commerce Commission was not empowered by Congress to use the powers given it by the Interstate Commerce Act in proceedings under section 77 of the Bankruptcy Act, and in any event no such power as the Commission here purported to use is contained in the Interstate Commerce Act.

In the first place, whether the powers of the Interstate Commerce Commission under the Interstate Commerce Act can be invoked in proceedings under section 77 of the Bankruptcy Act except to the limited extent expressly permitted by section 77 (q) is an important federal question which should be passed upon by this Court.

In the second place, Congress has been careful to withhold from the Commission any power under the Interstate Commerce Act to require the construction or use of terminals by interstate railroads or to fix the terms of their use,[49] and has left this subject entirely to the police power of the states.[50] In holding otherwise the courts below are the only courts which have construed the Interstate Commerce Act as they have construed it, and such construction decides a federal question in a way probably in conflict with the applicable decisions of this Court above cited in

[49] Except in special cases provided for by section 3 (5) of the Interstate Commerce Act which have no application here.

[50] *Interstate Commerce Commission* v. *Los Angeles*, 280 U.S. 52 (1929). *Atchison, Topeka & Santa Fe Ry.* v. *Railroad Commission*, 283 U.S. 380 (1931).

note 50 and presents an important question of federal law under the Interstate Commerce Act which should be settled by this Court.

B. The power which the Commission and the District Court purported to exercise under the Bankruptcy Act was not granted them by that Act.

The District Court in approving the plan of the Fifth Supplemental Report and Order held that section 77 of the Bankruptcy Act empowered the Commission and the District Court by the provisions of a plan of reorganization to supersede a statute of a sovereign state, enacted in the exercise of its police power, and this holding was sustained by the Circuit Court of Appeals.

This Court has held that "the intention of Congress to exclude States from exerting their police power must be clearly manifested," [51] and has held that the police power of the sovereign states is one of the least limitable by federal authority.[52]

Although the Circuit Court of Appeals held that the plan of reorganization constitutes an offer to The Boston Terminal Company as to the *terms* upon which the debtor railroads *may use* the terminal facilities in the future, nevertheless the plan also supersedes the Act of 1896 with respect to the *obligation* of the debtor railroads *to use* the terminal "for all of their terminal passenger business in Boston," and the Circuit Court of Appeals so held, thereby necessarily construing section 77 as being a manifes-

[51] *Napier* v. *Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 611 (1926); cited with approval in *Allen-Bradley Local* v. *Board*, 315 U.S. 740, 749 (1942). *Kelly* v. *Washington*, 302 U.S. 1 (1937). *Connecticut Light & Power Co.* v. *Federal Power Commission*, decided by this Court March 26, 1945.

[52] *District of Columbia* v. *Brooke*, 214 U.S. 138, 149 (1909). *Eubank* v. *Richmond*, 226 U.S. 137 (1912). *Sligh* v. *Kirkwood*, 237 U.S. 52, 59 (1915).

tation of the clear intent of Congress to grant to the Commission and the District Court power so to do by means of a plan of reorganization. The Circuit Court of Appeals reached this result by invoking the provisions of section 77 (f), giving to the *reorganized debtor upon confirmation of a plan of reorganization* full power and authority to *carry out* the plan, "the laws of any State or the decision or order of any State authority to the contrary notwithstanding."[53] Section 77 (f) is not a grant of power to the *Commission* to formulate terms of a plan of reorganization; that grant is contained in section 77 (b), which confers no power to insert in a plan of reorganization a provision to annul a state statute.

No court except the courts below have construed the provisions of section 77 in this respect as they have construed them, and this construction presents important questions of federal law which should be settled by this Court.

C. To leave unreviewed a holding that the police power of a sovereign state over a union passenger terminal and over passenger service to be furnished on lines operating within the state may be nullified by means of a plan of reorganization of a railroad would invite not only further invasion of the police power of the state in kindred matters such as statutes requiring the abolition of grade crossings and the protection of employees within the state, but also the invasion of the taxing power of a sovereign state over

[53] The statements in *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939) by Mr. Justice Frankfurter on pages 88 and 89 are merely a suggestion of an undecided possibility by way of contrast with what was decided. The issue as to whether the Commission by a plan of reorganization could override a valid state statute was not in issue in the case. It is respectfully submitted that this dictum so fundamentally relied upon by the Commission and the courts below as controlling should be clarified by this Court.

reorganized railroads operating within the state's boundaries under state-granted charters and franchises.

D. Furthermore, the provisions of the plan of reorganization of the Boston & Providence Railroad Corporation proposed by the Commission but not yet acted upon by the United States District Court for the District of Massachusetts (in which court the Boston & Providence proceedings are pending) are similar to those contained in the plan for the New Haven and the Old Colony (Appendix, p. 46). The provisions of the Boston & Providence plan must eventually be acted upon by the District Court in Massachusetts and possibly passed upon by the Circuit Court of Appeals for the First Circuit. It is therefore important that these questions should be determined by this Court in order that a possible conflict of decision between two Circuit Courts of Appeals be avoided.

*In holding that section 77 of the Bankruptcy Act empowers the Commission and the District Court by a plan of reorganization ex proprio vigore to amend the charters of the debtor railroads, the Circuit Court of Appeals decided important questions of law which have not been but should be settled by this Court.*

Section 77 (b) (5) of the Bankruptcy Act states that a plan "shall provide adequate means for the execution of the plan, which may include . . . the amendment of the charter of the debtor." The District Court construed this language as being a grant of power by Congress to the Commission and the District Court to amend and rewrite (by means of a plan of reorganization) a state statute constituting the charter of a debtor, and this holding was affirmed by the Circuit Court of Appeals.

The clause of section 77 (b) (5) relating to amendment of charters was not in the original act but was inserted

among the amendments of 1935 proposed by the Federal Coordinator of Railroads, who did not list it among the "important amendments proposed."[54] Prior to its adoption it was not even referred to in the hearings before the House Judiciary Committee, or in the debates in the House and Senate upon passage of the bill.[55] The history of this legislation discloses no clear intent on the part of Congress to confer upon the Commission power to amend state charters by a plan of reorganization *ex proprio vigore* rather than to provide for application to the state of incorporation for whatever amendments might be necessary.

The function of granting and amending charters of corporations is pre-eminently legislative and not administrative or judicial. Though Congress itself, acting as a legislative body, may charter a corporation in certain circumstances, it cannot delegate to a commission or to the federal courts such a peculiarly legislative function. Even if Congress acting as a legislative body could amend a state charter, it could not legally delegate such a legislative function to a commission or to a court.

Even if the bankruptcy power could be so broadly construed as to empower Congress to delegate the function of amending charters granted by the authority of a sovereign state, there is no apt language in the Bankruptcy Act to show a clearly manifested intent on the part of Congress to exercise such a power.[56]

No court except the courts below have construed the provisions of section 77 of the Bankruptcy Act as they did, and this construction presents important questions of fed-

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[54] Report of the Federal Coordinator of Transportation of 1934.

[55] 74th Congress, Railroad Reorganization Hearings, 1935, on H.R. 6249, pp. 1-330. 74th Congress, Congressional Record, pp. 13298-13309, 14139, *et seq.*

[56] *Palmer* v. *Massachusetts*, 308 U.S. 79, 83 (1939). *Kelly* v. *Washington*, 302 U.S. 1 (1937).

eral law which have not been but should be settled by this Court.

*In holding that the provisions of a plan of reorganization may amend and supersede the franchise and charter granted the Old Colony by the Commonwealth of Massachusetts so as to relieve the Old Colony from its obligation to furnish passenger service on its lines operated within the Commonwealth, the Circuit Court of Appeals decided important questions of law which have not been but should be settled by this Court.*

The Old Colony is required by its charter to furnish passenger service upon its lines operated within the Commonwealth of Massachusetts unless relieved from such requirement by the Commonwealth.[57] Although section 77 (b) (5) of the Bankruptcy Act states that a plan of reorganization "shall provide adequate means for the execution of the plan, which may include . . . the sale of all or any part of the property of the debtor . . . ," nowhere in section 77 is power given the Commission or the courts through a plan of reorganization to authorize a cessation of passenger service on lines which the debtor continues to operate.[58]

The decision by the Circuit Court of Appeals that section 77 (f) is such a grant of power presents an important question of federal law which has not been but should be passed upon by this Court.

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[57] Mass. Acts of 1872, c. 143. Mass. General Laws, c. 159, secs. 16, 16A; c. 160, secs. 128, 129. See Appendix, pp. 49, 50.

[58] Section 77 (o) provides for complete abandonment of lines of railroad during the pendency of the proceedings but this does not permit curtailment of passenger service. *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939). The same rule applies under the Interstate Commerce Act. *Kansas City S. Ry. Co., Application*, 94 I.C.C. 691. *Morris & E. R. Co. Abandonment*, 175 I.C.C. 49.

*In holding that section 77 of the Bankruptcy Act confers upon the Commission and the District Court power by a plan of reorganization to compel the trustee in bankruptcy of a railroad in reorganization in another jurisdiction to elect whether to accept or reject a so-called offer contained in said plan, the Circuit Court of Appeals has decided important questions of law which have not been but should be settled by this Court.*

Granting that the Commission has the power to approve a plan of reorganization making an offer to a third person, the provisions of paragraph N(1)(b) of the plan impose upon the trustee in bankruptcy of The Boston Terminal Company the *obligation to elect* whether he will exclude the using bankrupt railroads from further occupation and use of the property of the Terminal Company and file a proof of claim for damages in the New Haven proceedings, or will accept the terms proposed in the plan, upon the condition that either acceptance of the proposed terms or *failure to reject the plan within a time to be fixed by the Commission* shall operate as a waiver of all claim of damages against the estates of the debtors. The trustee in bankruptcy of The Boston Terminal Company was appointed by the United States District Court for the District of Massachusetts in a proceeding under section 77 for the reorganization of that company. The Massachusetts Act of 1896, which constitutes the charter of The Boston Terminal Company, is mandatory upon the Company and contains no language which permits the Terminal Company itself to relieve the railroads named in the act from the obligations imposed by it, and such attempted action on the part of the company would be clearly *ultra vires*.[59] The trustee in bankruptcy of the Terminal Company can have no greater rights. The holding of the Circuit Court

[59] *Hurley* v. *Boston Railroad Holding Co.*, 315 Mass. 591 (1944).

of Appeals that a plan of reorganization of the debtor railroads may force upon the trustee of another corporation in bankruptcy in separate proceedings in a different court the acceptance or rejection of such an offer under such terms and penalties is beyond the power granted by section 77.

No court except the courts below has construed the provisions of section 77 of the Bankruptcy Act as they have construed them, and this construction presents important questions of federal law which have not been but which should be settled by this court.

*In holding that the procedure adopted by the District Court in its treatment of the Fourth and Fifth Supplemental Reports and Orders was proper, the Circuit Court of Appeals decided important questions of law which have not been but should be settled by this Court, and has so departed from the accepted and normal course of judicial proceedings as to call for an exercise of this Court's power of supervision.*

There can be no doubt that the jurisdiction of the Interstate Commerce Commission and of the District Court under section 77 of the Bankruptcy Act is wholly statutory and must be exercised in the manner prescribed by Congress.[60]

Section 77 (e) of the Bankruptcy Act clearly and explicitly states that after approval but *before certification* of a plan the Commission may modify it, and that after the Commission has finally approved a plan and certified it to the court, together with a transcript of the proceedings before it and a copy of the report and order approving the plan, all parties in interest may file objections and claims which shall be heard by the judge, who shall thereafter

[60] *Ecker* v. *Western Pacific Railroad Corp.*, 318 U.S. 448 (1943).

approve the plan if satisfied it is fair and equitable and complies with the legal standards of section 77. The plan approved by the Third Supplemental Report and Order was modified before certification by the plan which was approved by the Fourth Supplemental Report and Order and the plan as finally approved by the Fourth Supplemental Report and Order was certified to the court, together with a transcript of the proceedings. The District Court in its opinion of December 21, 1943, on the plan approved by the Fourth Supplemental Report and Order found that the plan in essential particulars failed to conform to legal standards [61] and expressly sustained objections to the plan.[62] Section 77 (e) provides that if the judge shall not approve a plan he shall file an opinion and shall enter an order "in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action." If the proceedings are referred back, the Commission shall proceed to a reconsideration of the proceedings under subsection (d) of section 77, which requires public hearings by the Commission, at which opportunity shall be given to any interested party to be heard. It therefore became the duty of the District Court, upon finding that the Fourth Plan failed to conform to legal standards, to comply with section 77 (e). The court could not improve the plan by correcting it by judicial decree.[63] Nevertheless, the court proposed to do just this by making the "corrections which are indicated in this opinion," but first invited the Commission to file a supplemental report or order and proposed to shape its decree in

[61] R. pp. 10713, 10717, 10718, 10724, 10740, 10741.

[62] R. pp. 10713, 10717, 10718, 10724, 10740, 10741. 147 F. (2d) 40, 44; R. p. 11527.

[63] *Ecker* v. *Western Pacific Railroad Corp.*, 318 U.S. 448, 474 (1943).

accordance with the response of the Commission.[64] Due objections were made by certain of your petitioners to this procedure, both to the Commission and to the District Court. The Commission (without a hearing and without affording any interested party an opportunity to be heard) nevertheless then issued its Fifth Supplemental Report and Order, which approved a plan radically different from that approved by the Fourth Report and Order, which was still pending before the District Court. The Fifth Report and Order expressly revoked the Fourth Supplemental Report and Order and the plan which that report had approved.[65] It was immediately certified to the Court without opportunity either for hearing or for petition to modify.

Obviously, if procedure of this character can be adopted, a District Court may circumvent the statutory requirements by retaining control of a plan which it disapproves, calling upon the Commission to report further plans until one satisfactory to the Court is reported, all without hearings before the Commission as required, even though (as in the present case) the final plan may be materially different from the plan first reported by the Commission and still in the control of the District Court and even without an opportunity to file a petition for modification.

No decision of this Court or of any other court other than the courts below has so construed the provisions of section 77, and the holding of this Court in *Ecker* v. *Western Pacific Railroad Corp.*, 318 U.S. 448, 474,[66] is apparently in conflict with the construction of section 77 adopted by the courts below. This construction by the courts below presents important questions of federal law under section

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[64] R. p. 10762.

[65] R. p. 10923.

[66] See also *Louisville & Nashville R.R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217.

77 of the Bankruptcy Act which should be settled by this Court.

*In approving the conduct of the Interstate Commerce Commission in receiving and acting upon the proposals of the Joint Report and adopting them in totidem verbis in the plan of reorganization, without hearings thereon, the Circuit Court of Appeals denied to the petitioners due process of law and acted in violation of the provisions of section 77 of the Bankruptcy Act.*

Section 77 (d) provides expressly that the Commission shall "hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, . . ." In spite of this provision the Commission, although the record was closed except for the purpose of receiving further proposals from the Compromise Committee, accepted and acted upon a Joint Report signed, not only by the Compromise Committee, but by other New Haven and Old Colony interests,[67] which changed radically the report of the Compromise Committee by suggesting for the first time in these proceedings that the New Haven and Old Colony be relieved of their statutory obligation to use the Boston Terminal for all of their terminal passenger business in Boston. Upon this radical proposal vitally affecting the welfare of the Commonwealth and of the City of Boston and the interests of the Terminal Company and its creditors, no opportunity was given them to be heard. Your petitioners respectfully submit that this action was not only in violation of section 77 but in violation of the fundamental principles of due process of law, and that this Court should

[67] R. pp. 9817, 9818, 209, 234, 235.

review the action of the Commission and the courts below in approving such action.

**Conclusion.**

In sustaining the order of the District Court the opinions below dealt with questions of interpretation of section 77 of the Bankruptcy Act, both as to procedure and as to matters of substance, that never have been but should be passed upon by this Court; has decided federal questions in a way probably in conflict with applicable decisions of this Court; has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision; and has sustained action by the District Court and by the Interstate Commerce Commission in matters vitally affecting the petitioners in violation of the Constitutional guaranty of due process of law.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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